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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

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No. 640

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BAILEY FARM DAIRY COMPANY, ET AL.,  
*Petitioners,*

*v.*

CLINTON P. ANDERSON, SECRETARY OF AGRICULTURE.

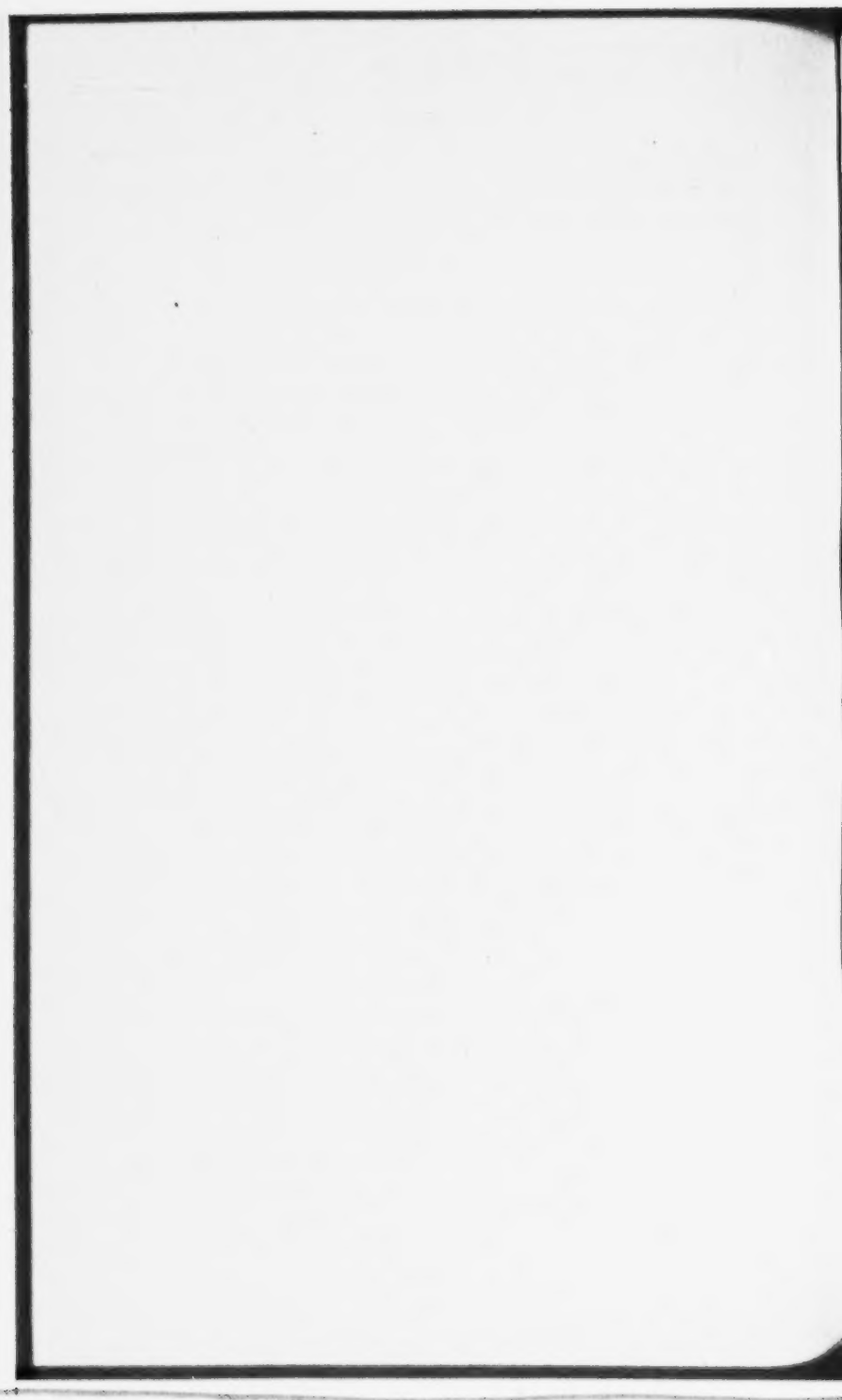
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PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT.

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**PETITION FOR WRIT OF CERTIORARI TO THE  
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FOR THE EIGHTH CIRCUIT.**

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Petitioners, Bailey Farm Dairy Company, et al., pray that a writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Eighth Circuit affirming the judgment of the United States District Court for the Eastern District of Missouri, Eastern Division.

**Opinions Below**

The opinion of the District Court (R. 29) is reported in 61 F. Supp. 209. The opinion of the Circuit Court of Appeals (R. 375) is not yet officially reported.

## Jurisdiction

The judgment of the Circuit Court of Appeals was entered on September 5, 1946 (R. 391-392). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

## Questions Presented

The Agricultural Adjustment Act as amended by the Agricultural Marketing Agreement Act of 1937 declares it to be the policy of Congress through the exercise of the power therein conferred upon the Secretary of Agriculture "to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power" equivalent to that of such commodities in the base period (August 1909—July 1914, or August 1919—July 1929, as determined by the Secretary). The Act, Section 8c(5)(A), authorizes the Secretary to issue orders applicable to processors of milk which

"shall contain one or more of the following terms and conditions and (except as provided in subsection (7)) no others:

"(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers . . .

"(B) Providing:

"(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them . . .

“(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

The question is whether a milk price order of the Secretary of Agriculture, prescribing a formula which requires that all milk produced by producers in the local production area up to an amount equal to 95% of the handler's actual use of milk from all sources in Class I be, because it is locally produced, classified as Class I taking the highest prices regardless of the handler's actual or pro-rated use of producer milk, is invalid because:

(1) The order violates the requirement of Section 8c(5) (A) that milk be classified in accordance with the form in or the purpose for which it is used;

(2) The order arrogates to the Secretary the power to direct how the milk shall be used without any authority therefor being contained in the Act;

(3) The order fixes minimum class prices for producer milk used in Class I that are not uniform as between importing and non-importing handlers as required by Section 8c(5) (A);

(4) The order, without authority in the Act, and in violation of the specific provisions of Section 8c(5) (G) in effect prohibits the importation and use of milk produced outside the local production area;

(5) The order for the St. Louis marketing area classifies milk in a manner different from that in which the same milk is classified by another order in the Chicago marketing area;

(6) The classification established by the order arbitrarily discriminates grossly against some handlers subject to the order so as to deprive them of their property without due process of law in violation of the Fifth Amendment.

### **Statute Involved**

The pertinent provisions of the statute<sup>1</sup> and order involved appear in the Appendix, pp. 31-37.

### **Statement**

The case involves the validity of certain amendments to Federal Milk Order No. 3, which regulates the handling of milk in the St. Louis, Missouri, Marketing Area as such area is defined therein.

1. *Federal Milk Order No. 3*—The order was originally issued by the Secretary of Agriculture on January 30, 1936, effective February 1, 1936, pursuant to the provisions of the Act. As from time to time amended, it has been in effect continuously from that date. This case arises under the order as reissued with amendments on December 27, 1943, effective January 1, 1944 (8 F. R. 17451; Appendix, p. 34), and, unless otherwise stated, references herein are to the order as thus reissued.

The purpose of the order, as recited therein, is to make effective the declared policy of the Congress to establish and maintain the purchasing power of producers of milk, and to insure a sufficient quantity of pure and wholesome milk for the marketing area (§903.0 (a)a (2) (2)). The order makes provision for an agency known as a market administrator to administer its provisions (§903.2).

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<sup>1</sup> References in this petition are to sections of the Agricultural Adjustment Act of 1933, as amended and reenacted by the Agricultural Marketing Agreement Act of 1937 and amended.

*Principal regulatory provisions of the order.* The principal regulatory provisions of the order are those purportedly made pursuant to subsections 8c(5)(A) and (B)(i) of the Act.

The term "producer" is defined in the order as any person who produces milk, under a dairy farm permit or rating issued by the proper local health authorities for the production of Grade A or Grade B raw milk, which is received at a plant from which milk is disposed of as fluid milk in the marketing area (§ 903.1(e)). The term "handler" is defined as any person who receives milk from producers, associations of producers, or other handlers, all or a portion of which milk is disposed of as fluid milk in the marketing area (§903.1 (f)), which includes the City of St. Louis and adjacent areas in Missouri and Illinois (§903.1(c)).

The order purports to classify milk according to its use by each handler: Class I, milk used as fluid milk; or, Class II, milk used or disposed of in some other form such as cream or other milk products (§903.3(b)). Section 903.4 fixes a minimum price for each class (§903.3), and purportedly establishes a minimum uniform price to be paid by each handler to all of his producers (§§ 903.7, 903.8). It is important to note that while all milk received by each handler is necessarily classified, only milk received from *producers* is priced. Milk received by each handler from sources *other than producers* which includes imported milk<sup>2</sup> and ungraded milk<sup>3</sup> is classified but not priced

<sup>2</sup> "Imported milk" consists of milk approved by the St. Louis Health Commissioner received by handlers from dealers in other markets whose health regulations are comparable to those of St. Louis; and may be disposed of inside or outside the marketing area.

<sup>3</sup> "Ungraded milk" includes milk disposed of in the marketing area during times of shortage under special permits of the St. Louis Health Commissioner but not under a "dairy farm permit or rating" as specified in § 903.1(e), and excludes ungraded milk disposed of outside the marketing area unless otherwise stated.

(§§ 903.3, 903.4, 903.7, and 903.8). The accounting period is the delivery period for milk which is the calendar month (§ 903.1 (h)).

Under the order in determining the price to be paid producers by each handler, all his milk from all sources, including that received from producers, is classified as Class I or Class II (§ 903.3 (b)). After this step, in the case of an importing handler<sup>4</sup> or a handler of ungraded milk<sup>5</sup> a further classification is made under a provision entitled "Classification of Producer Milk." This is § 903.3(e)<sup>6</sup> first introduced into the order by the amendment effective January 1, 1944. It is this sub-section that constitutes the principal basis of objection by appellants. This

<sup>4</sup> Hereinafter, a handler who receives imported milk as well as milk from producers will be called an "importing handler", and a handler who receives only producer milk will be called a "non-importing handler".

<sup>5</sup> Hereinafter a handler who receives ungraded milk as well as producer milk will be termed a "handler of ungraded milk".

<sup>6</sup> Sec. 903.3(e) provides as follows:

(e) *Classification of Producer Milk.* The market administrator shall determine the classification of milk received by each handler from producers as follows:

(1) Subtract from the total pounds of milk in each class the total pounds of milk, skim milk, and cream received from other handlers and allocated to such class pursuant to (c) of this section;

(2) Subtract from the remaining pounds of Class I milk the pounds of ungraded milk received from sources other than producers or handlers which was disposed of as fluid milk outside the marketing area;

(3) Subtract from the remaining pounds of milk in Class II (other than milk used for evaporated milk in hermetically sealed containers) an amount so utilized but not to exceed 5 percent of the total receipts of milk from producers: *Provided*, That a smaller percentage shall be applied under this subparagraph if designated by the handler on his report made pursuant to § 903.5(a) (1).

(4) Subtract from the remaining pounds of milk in each class, in series beginning with the lower-priced Class II use, the pounds of milk, skim milk, and cream received from sources other than producers or other handlers; and

(5) Add to the net figure for Class II milk computed under (4) of this paragraph, the amount subtracted under (3) of this paragraph.

sub-section, for obvious reasons referred to by the Government as an "allocation provision," is nothing more than a formula that must necessarily always result in the arbitrary classification of 95% of the producer milk as Class I milk, subject only to the limitation that the handler must have used a total in Class I equal to that quantity. The undisputed result of applying this new provision is (1) a preferential classification of more of the producer milk as Class I and less as Class II, and (2) a discriminatory classification of most of the imported milk and ungraded milk as Class II and less as Class I, regardless of how such milk was actually used and without relation to the ratio between the two classes in which all milk received by the handler was actually used. The extent of the preference and the discrimination under the provision is as follows:

Of the milk originating with the producers, a quantity equal to 95% is always treated as entitled to priority of classification as Class I milk. The result is that 95% of the producer milk is classed as Class I milk when the handlers' total Class I use of milk is in a quantity exceeding 95% of the producer milk; only 5% of the producer milk then falls in Class II. Where the Class I use of milk by the handler is not in excess of a quantity equal to 95% of the producer milk, then all of the Class I milk is apportioned as producer milk and none is apportioned to the imported milk; to the extent that producer milk exceeds the total of Class I use by the handler, it falls into Class II.

In either case, the imported milk or ungraded milk received by the handler is not classified as Class I until the producer milk has received its 95% priority in Class I. Consequently it is always classified as Class II in a much greater proportion than is producer milk.

This provision for arbitrary classification of producer milk as Class I contained in § 903.3(e) was first introduced into the order by the amendments effective January 1, 1944. Prior to such amendments, milk received by the handler was under the statute properly classified as Class I or Class II according to use. The classification of producer milk was determined by apportioning to producers and to the outside sources, a fraction of the total of milk in each class equal to the respective ratios that the milk from each source bore to the whole.<sup>7</sup>

After producer milk has been thus classified, minimum class prices are applied. Mathematically, the uniform price per hundredweight to be paid to his producers by each handler is obtained by multiplying the quantity of producer milk in each class by the applicable minimum class price, and then dividing the aggregate result by the total quantity of producer milk (§ 903.7(a)(b)). But the price to be paid by each handler, although uniform as to his producers, may, in consequence of a difference in utilization differ from the price to be paid by another handler.

The manner in which the order operates may be illustrated by assuming that a handler receives 1000 lb. of milk during the monthly delivery period, 800 lb. from St. Louis producers, and 200 imported from a Chicago dealer; and that he uses 900 lb. of the total in Class I and 100 lb. in Class II. Prior to the amendment of January 1, 1944, the milk received from producers would have been classified in a ratio exactly the same as that obtaining for all of the milk:

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<sup>7</sup> Prior to January 1, 1944, Order No. 3 had contained the following provision (7 C. F. R. Cum. Supp., § 903.3(d)): "Milk approved by the proper health authorities for consumption in fluid form in the marketing area which has been received from a person who is a handler, as defined under another Federal marketing agreement or order, shall be deducted from each class in the proportion that the quantity used in each class by the receiving handler bears to the total quantity of milk received by him, after excluding such handler's receipts of milk from other handlers."

under the assumed figures, since 80% of the total milk was received from producers, 80% of the 900 lb. in Class I or 720 lb. would be apportioned to producers as Class I, and the balance, or 180 lb., would be apportioned to the Chicago dealer. Under the order as amended January 1, 1944, however, the application of the classification provision in § 903.3(e) to the same assumed figures would result in the apportionment to producers of a quantity as Class I equal to 95% of 800 lb., or 760 lb., with the balance, 140 lb., being apportioned to the Chicago dealer. Under the old order, of the handler's total of 100 lb. in Class II, 80% or 80 lb. would have been apportioned to the producers and 20% or 20 lb. to the Chicago dealer. Under the new order, only 40 lb. of the Class II milk, having lower value, is apportioned to producers and 60 lb. of the Class II milk is apportioned to the Chicago dealer. The amendment of January 1, 1944, in this instance thus increases the amount of producer milk in Class I from 720 to 760 lb.

The effect of the new allocation provision on the computation of the minimum price to be paid producers for any particular month may be shown by applying to the use classifications in the above example, under the order before and after its amendment January 1, 1944, the price actually determined under § 903.4(a) of the amended order for the month of January, 1944, for milk containing 3.5% butter fat:

	Class I		Class II		Total cwt.	Uniform (or Average)	
	\$3.627 per cwt. Pounds	Value	\$2.977 per cwt. Pounds	Value		Total Value	Price per cwt.
Prior to Amendment	720	\$26.114	80	\$2.382	800	\$28.496	\$3.562
Subsequent to Amendment	760	\$27.565	40	\$1.191	800	\$28.756	\$3.595

From this computation, it is apparent that under the assumed uses the amendments of January 1, 1944, as to

classification, had the effect of increasing the uniform price for producer milk by the sum of 3.3 cents per hundred-weight.

The weighted-average computation of the uniform price to be paid producers by handlers for any particular month is also made applicable to non-importing handlers. However, since producer milk received by a non-importing handler is classified in the same ratio as his actual utilization thereof and is not affected by the "allocation" provision, no computation is necessary to show that such handler pays the same uniform price for milk utilized in the same classes in the same ratio as before the amendment.

2. *Administrative proceedings.*—The War Food Administrator on September 3 and 4, 1943, held a promulgation hearing on proposed amendments to Federal Milk Order No. 3. Under one of the proposed amendments, a handler of both milk priced by the order and milk not priced by the order, who utilized milk in more than one class, would be required to make allocation of his Class I utilization to milk priced by the order insofar as such milk is available (R. 277-278). A proposed order embodying amendments was published October 15, 1943 (8 F. R. 14063). Written exceptions were filed by appellants (R. 260) but the order as amended was promulgated to become effective January 1, 1944. The same day petitioners filed a petition with the Administrator under Sec. 8c (15) (A) of the Act challenging provisions of the order as not in accordance with law.

The complaint of the petition was directed primarily to the new allocation provision in § 903.3(e), providing for arbitrary classification of producer milk as Class I.

Hearing on the petition was held on March 27 and 28, 1944. The record made includes the following salient facts: During the greater part of each year for a number of years, production of milk by local producers has been inadequate

for Class I and Class II requirements in St. Louis, and during the fall of 1943, local production had been insufficient for Class I requirements (R. 38, 125-127, 129-132, 134-135, 150-152, 168-170, 176, 181, 185, 190, 264, 203-217, 351, 355-357); some St. Louis handlers, over a period of years have been purchasing milk from Chicago dealers (R. 38, 264, 383) who are handlers under a separate federal milk order applicable to the Chicago marketing area (7 C. F. R. Cum. Supp., § 941.0 *et seq.*, 7 C. F. R. 1944 Supp., §§ 941.4, 941.5; the St. Louis health authorities have approved this Chicago milk for consumption in the St. Louis area (R. 129, 192-193, 219, 264); because imported milk is more expensive, St. Louis handlers import milk only when local producer milk is unobtainable to meet their needs (R. 117, 128, 133-135, 150-152, 159, 168-170, 181); it is necessary for St. Louis handlers to enter long-term contracts for importation of a minimum volume in order to assure an adequate supply during local shortage periods which include a number of days in certain months (R. 132-133, 150-151, 154, 159, 168, 170).

The record shows also that imported milk and producer milk are not kept separate but commingled so that the use of any particular milk can not be established (R. 40, 268); that ungraded milk, however, is not commingled with milk from other sources since local health laws prohibit such commingling (R. 222).

The record shows further: Prior to the amendments of January 1, 1944, a handler importing Chicago milk pooled this milk with producer milk, as provided in the order effective then, and paid producers a uniform price based upon the Class I and Class II uses of all the milk handled; and based his payments to Chicago dealers for the imported milk on the use of all the milk received, although there was no provision in the St. Louis order covering such payments. Under the classification provisions of § 903.3 (e)

a handler is required to allocate producer milk to Class I, up to 95 percent of the handler's Class I use, prior to the allocation of any other milk to such use. If a handler importing Chicago milk continues to do so in the same manner as prior to January 1, 1944, the general effect of the amended classification provisions will be to raise the percentage of producer milk considered as used in Class I and thus increase the uniform price to producers; and the same result would apparently follow if the importing handlers should import only an amount of milk necessary to fill Class I needs not met by the local producer milk (R. 264).

After argument, oral and written, the administrator made findings of fact and conclusions of law, and entered an order denying the relief sought and dismissing the petition (R. 257-276).

3. *Court proceedings.*—Petitioners, acting pursuant to Section 8c (15) (B) of the Act, filed their complaint in the district court on October 12, 1944, for a judicial review of the administrative ruling (R. 3-19). An answer was thereafter filed by defendants, in which it was averred that the administrative ruling was in accordance with law, and in which a counterclaim was made for the enforcement of the order (R. 20-25). A motion for summary judgment was filed by defendants on March 5, 1945 (R. 26-28). The district court, after hearing, filed an opinion sustaining the motion and entered judgment upholding the administrative ruling and requiring compliance with the provisions of the milk order (R. 29, 74-75).<sup>8</sup>

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<sup>8</sup> By order dated July 11, 1945, and by further order, dated September 28, 1945, the District Court stayed enforcement of the judgment insofar as it directs payment to producers of amounts representing the increase in price due to the change in classification of milk in § 903.3(e) of the amended order, pending determination of the case.

On August 15, 1945, Clinton P. Anderson, Secretary of Agriculture, was substituted as defendant in place of the original defendants (R. 77).

The Circuit Court of Appeals affirmed (R. 375, 391-393).

### **Specification of Errors to Be Urged**

The Circuit Court of Appeals erred:

1. In holding that requirement of Section 8c (5) (A) of the Act that classification be "in accordance with the form in which or the purpose for which it is used" has reference only to local producer milk.

2. In failing to hold that § 903.3 (e) of the order classifies producer milk on a basis other than the form or purpose of its use, and so violates Sec. 8c (5) (A) of the Act.

3. In failing to hold that § 903.3 (e) of the order has the effect of directing the handler to use his milk in a particular way, and is therefore not a provision authorized by the Act.

4. In holding that § 903.3 (e) of the order does not violate the provision of Sec. 8c (5) (A) of the Act that minimum prices shall be uniform as to all handlers.

5. In holding that § 903.3 (e) of the order does not violate the provision in Sec. 8c (5) (G) of the Act that an order shall not prohibit the marketing in any marketing area of milk produced in any production area.

6. In failing to hold that the allocation provision in § 903.3 (e) of the order violates the requirements of due process guaranteed by the Fifth Amendment of the United States Constitution.

### **Reasons for Granting the Writ**

The Circuit Court of Appeals by its holding has given a severely limited construction to a section of a statute highly important in its day to day application to an enormous industry, and this in a case which will become a precedent in matters of price regulation necessarily having an adverse effect upon and possibly resulting in the destruction of many business enterprises. On the theory that the policy

of the Agricultural Marketing Agreement Act is to benefit producers by obtaining better prices for them, the court below has justified an arbitrary classification not only unauthorized but specifically prohibited by the Act and evolved as a subterfuge to give to producers an increase in the return on sale of milk that could not be obtained by the outright price adjustment contemplated by the Act because of the Emergency Price Control Act. No theory of policy under the Agricultural Marketing Agreement Act can reasonably be invoked to defeat the specific provision of the same Act requiring classification by form of use or purpose of use or to evade the equally clear policy against price increases that was evidenced by the Emergency Price Control Act of 1942.

**I. The Circuit Court of Appeals has decided a question of interpretation of a Federal statute important in its consequence to an industry vital throughout the nation and which should be settled by this Court.**

The meaning of Section 8c(5)(A) must necessarily have an important and continuing effect on the dairy industry that plays such an indispensable part in the health of the nation. The decision is in conflict with the plain terms of the statute and gives overriding effect to an alleged policy in derogation of provisions specifically erected as a safeguard against arbitrary and discriminatory action.

*1. The amended order violates the statutory requirement that milk be classified and priced only according to use.—* Section 8c(5) of the Act prescribes the specific terms that milk orders shall contain, and reads in part:

“In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and . . . no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or

providing a method for fixing, minimum prices for each such use classification which all handlers shall pay . . . for milk purchased from producers or associations of producers."

The Act requires that milk be classified by use because the value varies with its use. Actually, milk sold for fluid use is paid for by the consumer at higher prices. Accordingly, it constitutes a higher cost to the handler and brings a higher return to producers. In brief, the purpose of use classification is to assure to producers a price for their milk comparable to the values of the uses to which it is put. Therefore, use classification of milk is the initial and an essential step to the application of the minimum prices fixed by the order.

The definitions of Classes I and II, as provided in Section 903.3 (b) of the amended order, quite obviously are classification of all the handler's milk in accordance with "the form in which or the purpose for which it is used", as required by Section 8c(5) (A) of the Act; but the classification formula for producer milk, as provided in Section 903.3(e) of the amended order, clearly is not such classification and is therefore violative of the statute.

a. *Use of producer milk was properly determined under the older order.*—The court below has found that prior to the amendment of the order on January 1, 1944, the milk imported from the Chicago area was classified as Class I or Class II by proration on the same basis as the producer milk from the St. Louis area as to both Class I and Class II utilization (R. 382). That the proration method of classification is the method contemplated and required by the Act is apparent for many reasons.

The record shows (R. 40, 268), and the court below held (R. 384, note 19), that in practice and as a matter of economic operation a handler commingles his producer milk and his imported milk, so that there is no way of establishing the

actual use of any particular milk. All of which means that imported milk and producer milk received at the plant of each importing appellant are indistinguishably mixed. Neither the Act, the order nor any St. Louis health regulation attempts to prevent the commingling of producer and imported milk, and respondent does not contend otherwise.

Therefore, the fact of commingling bears out the petitioner's contention that the handler's uses of all his milk determine the utilization of milk from *any* source that is commingled. When it is received by the handler and before it is used, the liquid milk from one of the two sources (importations and local producers) is of quality and intrinsic value equal to that from the other. Once the milk from one source loses its identity by mixing with milk from another source, the mixture becomes homogeneous. Because the liquid is untraceable in the homogeneous mass, milk from each source constitutes a proportionate part of the whole, a proportionate part of any fraction of the whole and therefore is deemed to be represented in the same proportion in each usage of the whole, or of a part thereof. This principle is as old as the Civil Law and is constantly applied in cases of conversion, in accounting by pipe lines and in bailments of homogeneous liquids or fungible goods. In applying this principle, the old St. Louis order merely followed long established precedents of equity and fairness.

The principle of proration of homogeneous liquids is embedded in the Act. Thus, Section 8c(5)(A)(B)(i) of the Act applies the principle in the classification and pricing of milk received from the individual producer. No one would seriously suggest that the milk of a single producer or of a particular segment of the local producers should be classified according to use on any other basis than pro rata the use classification quantities determined for all producer milk. It follows that since the amended order re-

quires imported milk as well as producer milk to be classified and since imported milk and producer milk are commingled and devoted to the same over-all usage of the handler, the usage of all imported milk should be determined by the same principle applying to the usage of an individual producer's milk, namely, by proration in accordance with the use in Class I and Class II of *all* milk received by the handler from approved sources.

Section 8c(5) (B) (ii) likewise applies the principle of proration in determination of the use of milk. Section 8c(5)(B)(ii) authorizes a market-wide pool as an alternative to the individual handler pool authorized by Section 8c(5)(B)(i). While St. Louis has an individual handler pool, many Federal orders in other large markets do have the market-wide pool. Cf. *United States v. Rock Royal Co-op.*, 307 U. S. 533, 554. Under the market-wide pool, the prorated usage of the combined milk of all producers in the market determines the usage of the combined milk of all producers delivering to each individual handler. That each handler under that plan pays the full use value of all milk received by him, through the pool adjustment pursuant to Section 8c(5)(C) of the Act, does not obscure the fact that the usage of all the milk handled by him is prorated upon the basis of market-wide usage, for the purpose of determining the price the handler shall pay *his* producers.

Section 8c(5)(F) is another provision of the Act embodying the principle of proration. This section permits a co-operative association to blend the net proceeds of all its sales in all markets in all use classifications, and make distribution thereof to its members.

The Act allows classification of milk according to its source or origin in only one instance. Section 8c(5)(D) requires that the milk of new producers must be bought at the lowest use classification under the order for at least

two months after the day of first delivery. Under the rule of statutory construction, *expressio unius est exclusio alterius*, Section 8c(5)(D) provides the Act's sole authorization for classification of any specific milk according to its source.

b. *Classification of producer milk is according to its source.*—Stripped of its verbiage and minor tolerance adjustments, the "allocation" formula set out in § 903.3(e) of the amended order has the effect of subjecting milk received by importing appellants to a plain and arbitrary classification based on its *source*, not on its utilization, since under it at least 95 per cent of producer milk must be regarded as higher-priced Class I milk before milk from any other source may be thus classified.

The term "source" was not invented or loosely chosen by appellants as a description of the classification method adopted by the amended order. Neither is it, as the court below held (R. 384): "a beguiling term for conjuring a legal artificiality into the distinction which inherently exists between producers' and non-producers' milk under the regulative purposes of the Act." We do not think it inappropriate to convey the thought that the place of origin of the milk is made to enter into the determination of its classification as Class I or Class II for purpose of pricing. Indeed, the order itself uses the word. The critical step in the working of the "allocation" formula is subsection (4) of § 903.3(e), which subtracts from each of the two classes of all the milk received by the handler "in series beginning with the lower priced Class II use" the milk "*received from sources other than producers.*" The "sources" of subtracted milk include imported milk and ungraded milk. This is the classification. It is difficult to imagine a more bold-faced classification by *source*. Subsection (4) forces imported milk wherever sold and ungraded milk sold within

the area into Class II regardless of the milk's use, and forces producer milk into Class I, regardless of its use. Obviously it makes no difference whether the Administrator directs that Class II milk shall be deemed first to have come from sources other than producers or that all Class I milk shall be deemed to have come from local producers (if not in excess of 95 per cent of their production) or that 95 per cent of the milk of local producers shall be classed as Class I (if the total in class I is in excess of 95 per cent thereof). The result is the same.

*c. Limits imposed by actual use do not constitute classification in accordance with form of use or purpose of use.—*

The reasoning of the Circuit Court of Appeals betrays the lack of foundation for the holding that classification of the producer milk received by the handler is classification according to use. That Court states (R. 385) "the formula here adopts as its basis of classification for producer milk the handler's available uses as of the time the milk is received. It treats such milk as being entitled for price purposes to the position of the handler's highest-class use (up to the extent of 95 per cent), which is the use to which it naturally would be applied except for the handler's purchase of outside milk." In other words, under this reasoning, the milk received from producers is Class I milk merely because it originated with the producers and "would be" used as Class I milk if other milk had not in fact been so used.

The further assertion (R. 386) that "It is the handler's actual utilization of milk that controls the operation of the formula" is true only if "controls" is used in the sense of "keep within limits" i.e. the milk classified as Class I because of its origin with the local producers may not exceed 95 per cent of the Class I use of the handler. But it is true, without qualification, that under the formula the

fact or origin with producers determines that such milk shall, subject to the limitation, be arbitrarily given prior classification as Class I milk.

d. *Classification of producer milk as Class I cannot be sustained as necessary protection against arbitrary segregation and use.*—The court below suggests that the formula according highest-class utilization to producer milk might possibly be justified as a means of avoiding frustration of the purpose of the act through arbitrary action of the handlers. It is suggested that they might segregate the outside milk, use it for Class I and thus unfairly deprive local producers of a fair blend price (R. 387). There is no evidence to sustain this view; it was not suggested by the administrator (R. 268); it was never suggested to have been done under the old order and appellants have never made contention that they would have been within the letter of the old order had they attempted so to do; it is contrary to the practical economic operation of a milk plant that milk of the same quality be segregated merely because it is from different sources (R. 384, note 19). There has been suggested no reason why classification of all milk by use and classification of the producer milk by proration, as under the old order, would not amply guard against the threat of frustration suggested by the court below. The question remains whether the milk is properly to be classified in accordance with the way the record shows it was used and handled, or whether it is to be classified in the way it *might have been* used and handled.

2. *The formula prescribed by the order in question violates the statutory requirement of uniformity of prices to be paid by handlers for each use classification.*—Section 8c(5)(A) provides that in an order prescribing “minimum prices for each such use classification which all handlers shall pay”, “such prices shall be uniform as to all

handlers." This requirement is violated by § 903.3(e) of the order since it forces some handlers to pay higher prices for each use classification of producer milk than other handlers pay. This is particularly true as between importing handlers and non-importing handlers (R. 111-116, 145-147, 164-165). The importing handler is compelled to pay Class I prices for some producer milk not actually used in Class I, while the non-importing handler is required to pay Class I prices only for milk actually used in Class I. It follows that the Class I minimum price per hundred-weight paid for producer milk actually used in Class I by the importing handlers was higher than the Class I minimum price paid for producer milk actually used in Class I by non-importing handlers.

Contrary to the statement in the opinion of the Circuit Court of Appeals (R. 388), appellants do not complain of the fact that the blend prices paid by separate handlers each month are different because of variations in volume and proportion of Class I and Class II utilization. Here the handlers are required to pay a higher price for milk in Class I than any non-importing handler pays, not because of the variations in volume and proportion of Class I and Class II utilization but because the formula has the effect of arbitrarily increasing the Class I price paid to producers for each pound of producer milk that is actually used in Class I by the handlers. While this is a consequence of the formula classification according to source rather than use, it is nevertheless a violation of the express provision of Section 8c(5)(A) requiring that the minimum price for each classification "shall be uniform as to all handlers." When the Secretary disregards the use classification provisions of the Act, the inevitable consequence is the disregard of the pricing provisions. Classification of milk is significant because it governs the price.

3. *The amended order unlawfully directs importing handlers to use producer milk as Class I milk.*—The only possible way by which respondent can escape the complaint that he has exceeded his authority to classify milk in accordance with the “form” or “purpose” of “use” lies in the assertion of a right under the Act to compel the handler to make particular use of any specific milk handled by him. Apparently, the respondent does assert just such a right, for the district court answered the following question in the affirmative (R. 40):

“The question under plaintiff’s present contention is whether the War Food Administrator has authority under the Act, in order to make effective classification and minimum price provision of the order and to provide for stabilization and uniformity of payment, both by handlers and to producers, to *require the utilization of local producers’ milk for Class One purposes prior to the use of imported milk or ungraded milk for such purpose*, where the War Food Administrator has deemed such action necessary to effectuate the declared policy of the Act.” (Emphasis supplied).

In this connection, the opinion of the Administrator states (R. 268):

“\* \* \* we see no unlawful discrimination in *provisions which would have the economic effect of requiring the handlers to utilize first as Class I the local producers’ milk before going to distant sources for Class I milk*. The handlers can then adjust their operations to use such distant sources for Class I milk not provided by the local producers \* \* \*” (Emphasis supplied).

The court below holds that the “allocation” formula “cannot be said to be a legal command to a handler to use his milk in a particular manner” because “he is as free in law to make such actual use of any part of his milk

for a particular purpose as he was before" (R. 388). In so holding, the court overlooked this obvious result: Even though a handler is in theory free in law to make actual use of any part of his milk in any way he chooses, he is in effect compelled in law to use producer milk as Class I before he so uses imported milk since the order arbitrarily considers the producer milk as being used as Class I whether or not it was so used.

There is a vast difference between (1) the right to dictate the use to which a handler shall put his milk from a specific source and (2) the right to classify the milk after the handler has used it as he determines best suited for his operations. The second right is clearly embodied in Section 8c(5)(A) of the Act, but the first right is clearly not. The statutory language, "Classifying milk in accordance with the form in which or the purpose for which it is used," cannot by any valid construction be tortured into meaning that the Secretary has the power not only to classify the milk in accordance with how it *has been used* but also to classify the milk in accordance with how that official *directs it shall be used*.

4. *Under the amended order prices paid by handlers are not based on each use classification as required by the statute.*—Section 8c(5)(A) of the Act not only requires milk to be classified in accordance with its use but also requires that prices be based upon "each such use classification." Obviously, if milk is classified in accordance with its source, prices based upon each such source classification are not fixed pursuant to the statutory direction. Class prices fixed by § 903.4 of the amended order are based upon an invalid method of classification and for that reason are themselves invalid.

5. *The amended order, in penalizing the utilization or handling of milk from other production areas, violates both*

*statutory and constitutional limitations.*—The conceded purpose of the formula prescribed by § 903.3(e) of the amended order was to give producer milk a priority of classification in Class I and force imported milk into Class II. This design has been accomplished (R. 39, note 1). In January and February, 1944, the only two months of experience under the amended order at the time of the administrative hearing on appellants' petition, not a single pound of the imported milk received by Pevely Dairy Company and St. Louis Dairy Company, two of the three importing handlers in the marketing area, was classified in Class I (Pet. Exs. 15 and 16, R. 233, 237-239; R. 137, 140-141, 156-158, 196-199, 200-201). During the same two months, Quality Dairy Inc., the remaining importer, was forced in each month to allocate to Class I usage 95 percent (less 3 percent for shrinkage in handling) of the total milk received from producers, before any imported milk was classified as Class I (Pet. Ex. 18, R. 249-251; R. 162, 171).

Prior, and subsequent, to the amendment of the St. Louis order here involved, the Chicago order, Amended Order No. 41, Chicago, 7 CFR Cum. Supp. 941.4(a) provided that milk or cream sold by a Chicago handler to a handler under another Federal milk order "may be classified on a prorata basis." This prorata provision of the Chicago order was later suspended on October 1, 1944 (9 F. R. 11307; 7 CFR Supp. 1944, § 941.4(a)) and since that date the alternative classification specified in the first proviso thereof has been in effect. Under it, Chicago handlers, from whom the importing appellants buy, were required to classify milk exported to St. Louis as Class I.<sup>9</sup> Under § 941.5(e) of the

<sup>9</sup> Section 941.4(a) of the Chicago order on January 1, 1944 read:

*"Classification of milk—(a) Basis of classification.* All milk purchased or received by a handler from producers, associations of producers, and other handlers, including milk produced by him, if any, and including milk or cream purchased or received from sources other

Chicago Order (7 CFR Cum. Supp. § 941.5) the Chicago handlers were required to pay their producers the Class I price under the Chicago order or the Class I price under the St. Louis order, whichever was higher.<sup>10</sup> And, of course, the Chicago handlers were under the necessity of charging the appellant milk handlers a price at least as high. Yet, under the St. Louis order as amended practically all of such milk is required to be classified as Class II. On the other hand, non-importing handlers were required to pay for milk used for their Class II purposes the lower Class II prices under the St. Louis order. Simple economic law thus places the non-importing handlers in such a preferential position as to the price of Class II milk that an importing handler cannot compete. Resultingly, the effect of the arbitrary classification of the Chicago milk was effectually to prohibit the importation of such milk.

The statute operates in two ways to forbid a penalty upon the marketing in any marketing area of any milk produced

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than producers or handlers, shall be reported by the handler in the classes set forth in paragraph (b) of this section: *Provided*, That (1) any milk moving as fluid milk from any handler's plant to a plant of a nonhandler who distributes fluid milk shall be classified as Class I milk and any cream moved in the form of cream to such nonhandler shall be classified as Class II milk, except for milk or cream in excess of the amount of Class I or Class II milk distributed by the nonhandler; . . . *And provided further*, That in the case of the sale of milk or cream by a handler to a person who is a handler under another Federal milk agreement or order, *such milk may be classified on a pro rata basis.*" (Emphasis supplied.)

<sup>10</sup> Section 941.5(e) of the Chicago Order reads:

"*Sales outside the marketing area.* (1) The price to be paid by a handler for Class I milk disposed of outside the marketing area, in lieu of the price otherwise applicable pursuant to this section . . . shall be the price, as ascertained by the market administrator, which is being paid for milk of equivalent use in the market where such milk is disposed of . . . *Provided further*, That such Class I price, as ascertained by the market administrator, less the adjustment for transportation, shall not be lower than the Class I price f. o. b. 70-mile zone, as set forth in § 941.5(a)(2) minus 20 cents."

in any production area: (a) Upon the face of the statute, and (b) under the express terms of Section 8c(5)(G):

“(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.”

The Act requires that orders shall contain one or more of certain specified terms and conditions and “no others” (Section 8c(5)). Nothing in these limited powers includes authority to restrict or lay burdensome consequences upon commerce in milk from one production area for the advantage of milk from another production area. Contrarily, Section 8c(5)(A) requiring use classification and uniform prices is inconsistent with a penalty on milk from any particular source; Section 8c(5)(D) negatives any implied authority for such penalty by specifically fixing a penalty on milk bought from new producers; and Section 8c(5)(F) applies the principle of treating milk from all sources on an equal basis, by allowing producer cooperatives to pay members upon the basis of blending the net proceeds of all their sales in all markets in all use classifications.

The legislative history of Section 8c(5)(G) makes it clear that the only limitations authorized thereby were those provided by the Act itself including the classification and pricing provisions and “such limitation as puts each area on an equality with other areas” (79 Cong. Rec. 13022). As to the first limitation (as has been shown above) no provision of the Act authorizes, expressly or impliedly, a preferential treatment of milk from any production area. Certainly the pricing provisions have nothing to do with the production area from which the milk priced is received.

The only limitation authorized by Section 8c(5)(G) is such limitation as is inherent in the operation of the provisions of the Act in strict accordance with their phraseology. An example of a valid limitation would be classification of imported milk in accordance with its use. If such classification had the effect of keeping out imported milk, the limitation would be valid. The Secretary may not, however, tack on a limitation not found within the wording of the provision, such a direction that imported milk be used in any particular class.

Although there is no express uniformity requirement in the commerce clause of the Constitution (Art. 1, § 8), it may be assumed "that discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment." *Steward Machine Co. v. Davis*, 301 U. S. 548, 585. Here costs differ as between handlers of milk, depending solely upon whether they—perfectly legally—deal also in out-of-state milk for either local or out-of-state distribution. Congress did not authorize this discrimination on the ground of regulating interstate commerce, for the "Declaration" Sec. 1, dedicates the statute to facilitating interstate commerce by eliminating burdens and obstructions.

Apportionment is properly to be made in the exercise of a reasonable judgment based on facts so pertinent and significant as to be of controlling weight as indications of value. *Rowley v. Chicago & N. W. Ry.*, 293 U. S. 102, 109-110. Where, as here, the evidence requires a finding that each hundredweight of milk received by the handler, whether from Chicago or from local producers, is used for exactly the same purposes, and in the same proportion in Class I and Class II and is worth no more than the value based on the weighted average value taking into account the two

classes of use, then it is clear that the apportionment to local producers of value based (except for a negligible 5 per cent tolerance) on the Class I use alone has no reasonable relation to the facts. Because of its arbitrary character the order plainly violates the due process clause. Because the order does not come "within constitutional limits" and is not "consistent with the statute" and is not "reasonable," it is invalid. *Arizona Grocery Company v. Atchison, Topeka & Santa Fe Railroad Company*, 284 U. S. 370, 388; *Manhattan General Equipment Co. v. Commissioner*, 297 U. S. 129, 134.

6. *Violation of a specific provision of the Act may not be justified on the ground that it effectuates the policy of the Act.*—One of the basic considerations leading to the conclusion of the Circuit Court of Appeals appears to have been the reliance upon a policy indicated in the Act, Sec. 2, to increase the prices payable to farmers (R. 377, 385, 387). But policy alone cannot confer power. The policy must be implemented by specific provisions in the Act. Here the policy was to be attained by increasing prices. There was no intention evidenced, or rightly to be found, to attain the intended benefit to the farmers by any such arbitrary or ill-founded method of artificial classification such as is here involved. Policy of the Act may not thus be converted into a blanket authority to ignore the specific provisions of the Act so plainly directed by Congress to limitation of administrative discretion and intended to safeguard against the type of classification of milk here involved.

**II. The importance of the question and the probability that it will constantly recur make desirable its resolution by this Court.**

As indicated in the opinion of the Circuit Court of Appeals (R. 387) provisions similar in their violation of Section 8c(5)(A) have crept into the orders with respect to other marketing areas. Cf. Dayton-Springfield, Ohio, Order No. 71, § 971.4(e)(10)(i)(ii), 10 F. R. 6165; Washington, D. C., Order No. 45, § 945.6(f), 10 F. R. 13585; Columbus, Ohio, Order No. 74, § 974.4(f)(2), 10 F. R. 1085; Minneapolis-St. Paul, Minn., Order No. 73, § 973.4(e)(4)-(i), 10 F. R. 13435; Tri-State Order No. 72, § 972.4(e)(9)-(i), 10 F. R. 8645.<sup>11</sup> Instability of economic conditions presages resultant pressures that will engender further resorts to the device exemplified in § 303.3(e) for indirectly increasing income to local producers without formally increasing the price. The probability of attacks upon that device will be, by the same token, increased. Protection of the interests of handlers will dictate invocation of the express limitation of the Act that has here been subverted by the Secretary.

<sup>11</sup> It may be noted, in passing, that the two orders to which the opinion of the circuit court of appeals refers (R. 387, note 21) as having been ratified and as "indistinguishable in principle" (Fall River, Mass., Order No. 5, Art. VI, § 1, 1 F. R. 202; Kansas City, Mo., Order No. 13, Art. VI, § 2, 1 F. R. 1724) involved no classification of milk produced in another production area. Here the findings show that the higher prices that appellants were required to pay for Chicago milk prevented its purchase and importation except when required to meet the local needs. Furthermore, no order or license in effect at the time of the reenactment and the ratification of the existing orders was a complete prototype of the order here concerned; no order then in effect based classification upon whether the milk originated with local producers or with handlers outside the production area. Congress cannot reasonably be presumed—by extension of the rule of implied enactment of administrative construction by statutory ratification—to have studied existing orders, perceived possible implied assertions of power under the statute and so approved such broadened scope in conflict with the express limitation of the statute. *In the Matter of M. H. Renken Dairy Co.*, 1 Agri. Dec. 6, 15.

The formula method embodied in § 903.3(e) of the St. Louis order was first evolved as a method of circumventing the price ceilings imposed on the sale of the producers' product by the Office of Price Administration. It requires no high degree of prescience to envision its wide use to avoid public reaction against higher prices to farmers and yet to impose a narrower spread on the numerically and politically less powerful handlers. Litigation will result in continued uncertainty as to costs with its adverse effect on enterprise and production. Decision of the question here involved by this Court will settle an issue of broad interest to the milk industry and eliminate the expensive and time-consuming litigation that will otherwise probably ensue in other jurisdictions.

### Conclusion

It is respectfully submitted that preservation of the statutory limitations on administrative authority imposed by the Act requires that writ of certiorari issue in this case.

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## APPENDIX

The Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U. S. C. 601 *et seq.* in section 1 reenacted, and in section 2 amended, the marketing provisions of the Agricultural Adjustment Act of 1933, 48 Stat. 31 as amended, including the amendments of August 24, 1935, 49 Stat. 750. The Agricultural Adjustment Act as so reenacted and amended provides:

Sec. 1. It is hereby declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce. [7 U. S. C. Sec. 601]

Sec. 2. It is hereby declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this title, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period \* \* \* [7 U. S. C. Sec. 602] \* \* \*

Sec. 8c(1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." \* \* \*

(2) Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the products thereof \* \* \* Milk \* \* \*

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and \* \* \* no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers. [7 U. S. C. Sec. 608c]

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them \* \* \* subject \* \* \* only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

\* \* \* \* \*

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

. . . . .

(11)(A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of this title.

. . . . .

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

. . . . .

(18) The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain, in accordance with section 2 and section 8e, the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period. The level of prices which it is declared to be the policy of Congress to establish

in section 2 and section 8e shall, for the purposes of such agreement, order, or amendment, be such level as will reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand, for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 8b or 8c, as the case may be, that the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period as determined pursuant to section 2 and section 8e are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices. [7 U. S. C. Section 608c]

**Federal Milk Order No. 3**, governing the St. Louis, Missouri, marketing area, as amended December 27, 1943, effective January 1, 1944 (8 F. R. 17451) provides:

§ 903.1 **Definitions.** The following terms shall have the following meanings:

. . . . .

(c) "St. Louis, Missouri, marketing area" herein-  
after called the "marketing area" [embraces not only  
the territory within the city of St. Louis, Missouri,  
but as well other specified areas in Missouri and  
Illinois].

(b) "Producer" means any person \* \* \* who produces, under a dairy farm permit or rating issued by the proper health authorities for the production of Grade A or Grade B raw milk, milk which is received at a plant from which milk is disposed of as fluid milk in the marketing area. \* \* \*

(f) "Handler" means any person who \* \* \* receives milk from producers \* \* \* or other handlers, all, or a portion, of which milk is disposed of as fluid milk in the marketing area \* \* \*

§ 903.2. *Market Administrator.*—(a) *Selection, removal and bond.* \* \* \*

§ 903.3 *Classification of Milk.*—(a) *Basis of Classification.* The market administrator shall classify, on the basis of the classes set forth in (b) of this section and subject to the conditions of \* \* \* (e) of this section, all milk, skim milk, and cream \* \* \* received by each handler during the delivery period. \* \* \*

(b) *Classes of Utilization.* The classes of milk shall be as follows:

(1) Class I milk shall be all milk the utilization of which is not established as Class II milk.

(2) Class II milk shall be all milk the skim milk and butterfat of which is established (i) as having been used or disposed of in any form other than as milk, and (ii) as actual plant shrinkage, but not to exceed 3 percent of the total receipts \* \* \*

(e) *Classification of Producer Milk.* The market administrator shall determine the classification of milk received by each handler from producers as follows:

(1) Subtract from the total pounds of milk in each class the total pounds of milk, skim milk, and cream received from other handlers and allocated to such class pursuant to (c) of this section;

(2) Subtract from the remaining pounds of Class I milk the pounds of ungraded milk received from sources other than producers or handlers which was disposed of as fluid milk outside the marketing area;

(3) Subtract from the remaining pounds of milk in Class II (other than milk used for evaporated milk in hermetically sealed containers) an amount so utilized but not to exceed 5 percent of the total receipts of milk from producers: *Provided*, That a smaller percentage shall be applied under this subparagraph if designated by the handler on his report made pursuant to § 903.5(a)(1).

(4) Subtract from the remaining pounds of milk in each class, in series beginning with the lower-priced Class II use, the pounds of milk, skim milk, and cream received from sources other than producers or other handlers; and

(5) Add to the net figure for Class II milk computed under (4) of this paragraph, the amount subtracted under (3) of this paragraph.

§ 903.4 *Minimum prices.*—(a) *Class Prices.* \* \* \* each handler shall pay at the time and in the manner set forth in § 903.8, not less than the following prices per hundred-weight of milk: [There follows an elaborate formula for computation of prices on Class I and Class II milk, respectively, by reference to the arithmetic average of prices paid at a large number of condensed milk plants in four states plus certain seasonal additions which recognize the greater worth of Class I milk.]

§ 903.5 *Reports of Handlers.*—(a) *Submission of Reports.* Each handler shall report to the market administrator in the detail and on forms prescribed by the market administrator [as specified] \* \* \*

§ 903.7 *Determination of Uniform Prices to Producers.*—(a) *Computation of the Value of Milk for Each Handler.* For each delivery period the market administrator shall compute the value of milk by producers disposed of by each handler, by (i) multiplying the hundred-weight of such milk in each class by the price applicable

pursuant to § 903.4, and adding together the resulting values of each class; \* \* \*

(b) *Computation of Uniform Price for Each Handler.* The market administrator shall compute for each handler the uniform price per hundredweight of milk received by him from producers during each delivery period as follows:

(1) Add to the value computed pursuant to (a) of this section the amount of the adjustment to be made pursuant to § 903.8(c) [which provides deductions by zones for milk received at plants located outside the marketing area]; and

(2) Divide the amount computed in (1) of this paragraph by the total quantity of milk received from producers: \* \* \*

§ 903.8 *Payment for Milk.*—(a) *Time and Method of Payment.* On or before the 15th day after the end of each delivery period [month], each handler shall make payment to each producer, for the total value of milk received from such producer during such delivery period, at not less than the uniform price per hundredweight computed for such handler pursuant to § 903.7, subject to the differentials set forth in (b) and (c) of this section.

Wm. P. Cummins,  
Mr. C. B. Stanley,  
William D. Stanley,  
Lawrence L. Stanley,  
Capt. for Parliament.

CUMMINGS & STANLEY,  
*Of Counsel.*

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

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No. 640

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BAILEY FARM DAIRY COMPANY, ET AL.,  
*Petitioners,*

*vs.*

CLINTON P. ANDERSON, SECRETARY OF AGRICULTURE

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

---

**REPLY BRIEF FOR PETITIONERS**

The brief for the Government narrows appreciably and makes plain the nature of the issue as to whether or not the milk order in question violates the requirement of Sec. 8C(5) of the Agricultural Adjustment Act of 1933 as re-enacted and amended.

I

**Classification of Milk According to Its Source Is Not Concealed by Terming It "Allocation."**

Sec. 8C(5)(A) provides that orders shall contain

"one or more of the following terms and conditions,  
and \* \* \* no others.

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay."

The Government recognizes (p. 7) that only the producer milk is subject to the pricing provisions of the order. Classification is pertinent only in the determination of price and it is therefore classification of the producer milk that is the end objective.

The Government's argument on this point amounts to no more than a rather obvious attempt to confuse measurement with classification.

It contends (p. 7) that:

"The order provides that all milk received by handlers shall be classified in Class I or Class II according to its use (Sec. 903.3)."

and the Government appears to deem the statute satisfied if some milk—handlers' or otherwise—is classified in accordance with use, for it asserts (p. 7):

"It follows that all of the handler's milk is classified according to use."

But the Government implicitly recognizes that after all the object and the problem is only to classify the milk of the producers. It says (p. 7):

"But since only part of the milk classified—the producer milk as distinguished from the outside milk—is subject to the pricing provisions of the order, it is necessary to determine what portion of the total quantity of milk in each use classification will be regarded as producer milk. Some system of allocation is necessary. The question presented in this case, therefore is not whether the milk is classified according to use, which it indisputably is, but whether the method for

*allocating* the producer milk as between the two classes is reasonable" (Emphasis supplied).

Yet by resort to the euphemism, "allocating," it thus attempts by rather shabby circumlocution to deny that the producer milk is classified within the meaning of the Act. Of course, the question is not whether the classification of producer milk as Class I is reasonable; the question is whether such classification of producer milk is "in accordance with the form in which or the purpose for which it is used" as required by the statute.

In effect the order makes two separate and distinct "classifications":

1. All milk *sold by the handler* is classified as Class I or Class II according to its use;

2. 95% of all milk *sold by the producers* is classified as Class I—not according to its use—but because it comes from the producers.

The first classification serves merely as a quantitative limitation on the amount of producer milk permitted to be classified as Class I. But plainly the statutory requirement that milk be classified only "in accordance with the form in which or the purpose for which it is used" is violated by an order classifying 95% of milk sold by producers as high priced Class I merely because it is producer milk. Neither can such classification and violation be obscured by the fact that all of the milk sold by the handler *is* classified according to its use. The statute does not permit that an order including a term classifying milk be a term "classifying *some* milk in accordance with the form in which or the purpose for which it is used." It requires that if an order includes a term classifying milk then all classification of all milk covered by the order be on that basis. The Government does not question that construction.

As Bentham long ago said: "Error is never so difficult to discern as when it has its root in language." But it would seem fantastic, were it not for the decision of the Court below, to believe that the fact of classification of producer milk as Class I milk for the single reason that it is producer milk may be lightly concealed and justified by saying that the process is not classification but allocation. The same attempt to call a spade a shovel is apparent in the Government argument (p. 10):

"It should also be noted that the proration method of allocation and the method of allocation adopted in the present order have the same relation to the so-called 'source' of the milk. Under both methods all the milk received by the handler is first classified according to its use and then the amount of milk in each classification is *apportioned* between producer milk and outside milk. One method of allocation is no more a classification according to source than is the other." (Emphasis supplied.)

Obviously the so-called "allocation" of producer milk to each class is a classification of the producer milk and when that "allocation" or "classification" is based, as the Government admits it is, not pro rata, but upon the assignment of 95% of the producer milk to Class I merely *because it is producer milk* then it is plain that the milk of the producers is classified only because of its source.

The utter lack of rationality in the argument of the Government is disclosed if we apply its reasoning to some more obvious "allocations":

If by the laws of Georgia voting eligibility of Negroes were determined only by age classification, then determination of the number of all residents in Class I, twenty-one and over, and in Class II, those under twenty-one, would be simple by resort to census. And thereafter, under the Government's theory it would not be classification other

than by age but perfectly proper to "allocate" 95% of residents of African descent to Class II. To paraphrase the Government's argument (Br., p. 7):

"Some system of allocation is necessary. The question presented in this case, therefore, is not whether the residents are classified according to age, which they indisputably are, but whether the method of *allocating* the negro residents as between the two classes is reasonable."

Again, admission to the Medical School of Harvard University might be required to be determined solely by classification of all applicants by a competitive examination according to grades, admitting those in Class I having a grade of 80% or higher and rejecting those having less than 80%. Under the Government's theory classification by this sole requirement would not be violated if thereafter all applicants whose name ended in "stein" were "allocated to Class II." The classification requirement, so the Government argues, was complete and satisfied when on the basis of marks in the competitive examination the total number in each class was determined. The subsequent discrimination resulted merely from "allocation."

Again a statute requiring classification of all citizens of New York City only in accordance with their membership or non-membership in the Communist Party would, under the Government's theory, be satisfied once the census determined the total number of those avowing and of those disavowing such membership. And if thereafter 95% of the Catholics in New York City were by name "allocated" to the Communist Party there would result no breach of the requirement that the classification be only in accordance with membership *vel non* in the Communist Party.

The fallaciousness of the argument of the Government, once the true meaning of the words are considered, is obvi-

ous. In spite of the resort to "allocating," "apportioned" and "assigning," to respond to these words as if they were symbols of something other than the fact "classifying" is to revert to primitive and verbal magic.

The question here is not one of interpretation of the language of Section 8C (5) (A). The Government does not quibble that it prohibits classification of milk except in accordance with use. It is difficult enough for the layman to accept judicial decision that the seemingly plain language of a statute means something else. Such rulings, however, are accepted as constructions by those skilled in the law. When, however, the Government seeks by euphemism to deny overt violation of the unambiguous command of a statute although the facts are plain to all, then reason rebels and a position so at war with common sense can tend only to breed disrespect for exercise of all Governmental authority.

Petitioners are not one of the more vigorous minorities who are able to focus public attention on the infringement of their rights. Petitioners rely on the exercise of the reasoned judgment of the members of this Court.

## II

### **Respondent's Purported Avoidance of the Proration Principle of the Act Is a Distinction Without a Difference**

The Government asserts that the provisions of Sec. 8c (5) (B) (ii) and 8c (5) (F) do not establish proration as an appropriate part of classification of producer milk in the St. Louis area because those provisions

"deal with prorating the total value of milk or its proceeds and have nothing to do with proration of commingled milk." (Gov't Br. p. 9)

If this means what it seems to say the Government is asserting that so far as application of the proration principle is concerned there is a difference between:

1. Paying a uniform price per hundredweight to producers in a market-wide pool where such price constitutes an average weighted according to the several uses of all the milk sold in the market; and

2. Paying a uniform price per hundredweight to producers in an individual handler's pool where such price is an average weighted, not according to the several uses of all the milk sold in the market, but weighted according to the several uses made of the milk by the individual handler.

Of course each method prorates (i.e. "divides or distributes proportionately" (at least Websters' International Dictionary so defines "proration")) to each producer the total sum to be paid to all producers as so determined, and necessarily this method in each instance assumes that each producer contributed milk having values for the several uses in the same proportion or ratio that was found to obtain for all the milk in the market-wide pool or in the handler pool respectively. Thus, again, a little common sense in analyzing what is said in the Government brief shows that the Government relies on a distinction without a difference.

A proration of the total value of all the producer milk inherently assumes that the value of each pound of one producer's milk is equivalent to the value of each pound of another producer's milk. Value depends upon use. It must follow that in prorating the total value of milk or its proceeds, the Act is likewise requiring a proration of the several usages of the total to determine the usages of the milk of an individual producer or of any segment of all the producers. It is significant that Sec. 8c(5)(B) requires the payment of "uniform prices" to producers and does

not specify whether uniformity is to be achieved by proration of total value or of the totals in the several classes. To do so would be vain since computation of price in either event would yield the same result, the difference lying only in the order in which the mathematical operations of the computation are performed. The Government's distinction amounts to nothing more than a choice as to the order. Whatever the order, the Act in each of the sections above referred to does clearly embody the principle of proration.

### III

#### **Authorized Differences in Terms of Orders Based on Regional Differences in Production and Marketing Do Not Include Terms Violative of the Act.**

The Government relies on Sec. 8c(11)(A), (C) as authorizing regional differences in terms. All this provision means is that the Secretary may fix prices in one market, e. g., Kansas City, different from those fixed in another market, e. g., St. Louis; may have two use classifications of milk in one market and four use classifications in another, etc. The provision does not mean that prices may be uniform to producers in Kansas City and not uniform to producers in St. Louis, nor does it mean that milk may be classified by "use" in Kansas City and "source" in St. Louis. The meaning of statutory language must be observed in framing provisions in all regional orders. Milk imported from Chicago classified as fluid milk by the Chicago order, and used as fluid milk in St. Louis, cannot then be classified as butter by the St. Louis order under authority of Subsections 8c (11)(A), (C). Terms in different orders may differ in some respects but they must still comply with the language in Section 8c(5) of the Act.

Although Section 8c(5)(G) does not define "production area," the section applies to "milk . . . produced in

any production area.” There can be no proper claim that this language is so narrow as to exclude from the statutory prohibition any milk not produced by St. Louis. The fluid milk imported by appellants is approved milk permitted by St. Louis health authorities to be used for all purposes for which producers’ milk is used (R. 264, 219).

The statement in the Government’s brief that minimum producer prices fixed for regional market “are not to be condemned merely because these prices make it less profitable, or unprofitable, for handlers subject to the order to purchase outside milk” ignores the indirect but none the less real prohibitory effect on importation of milk from other areas, a result directly opposed to the manifest purpose of Sec. 8c(5)(G).

### Conclusion

It is respectfully submitted that the administrative violation of the unquestioned mandate of the statute is so clear as to require the interposition of the jurisdiction of this Court.

December, 1946.

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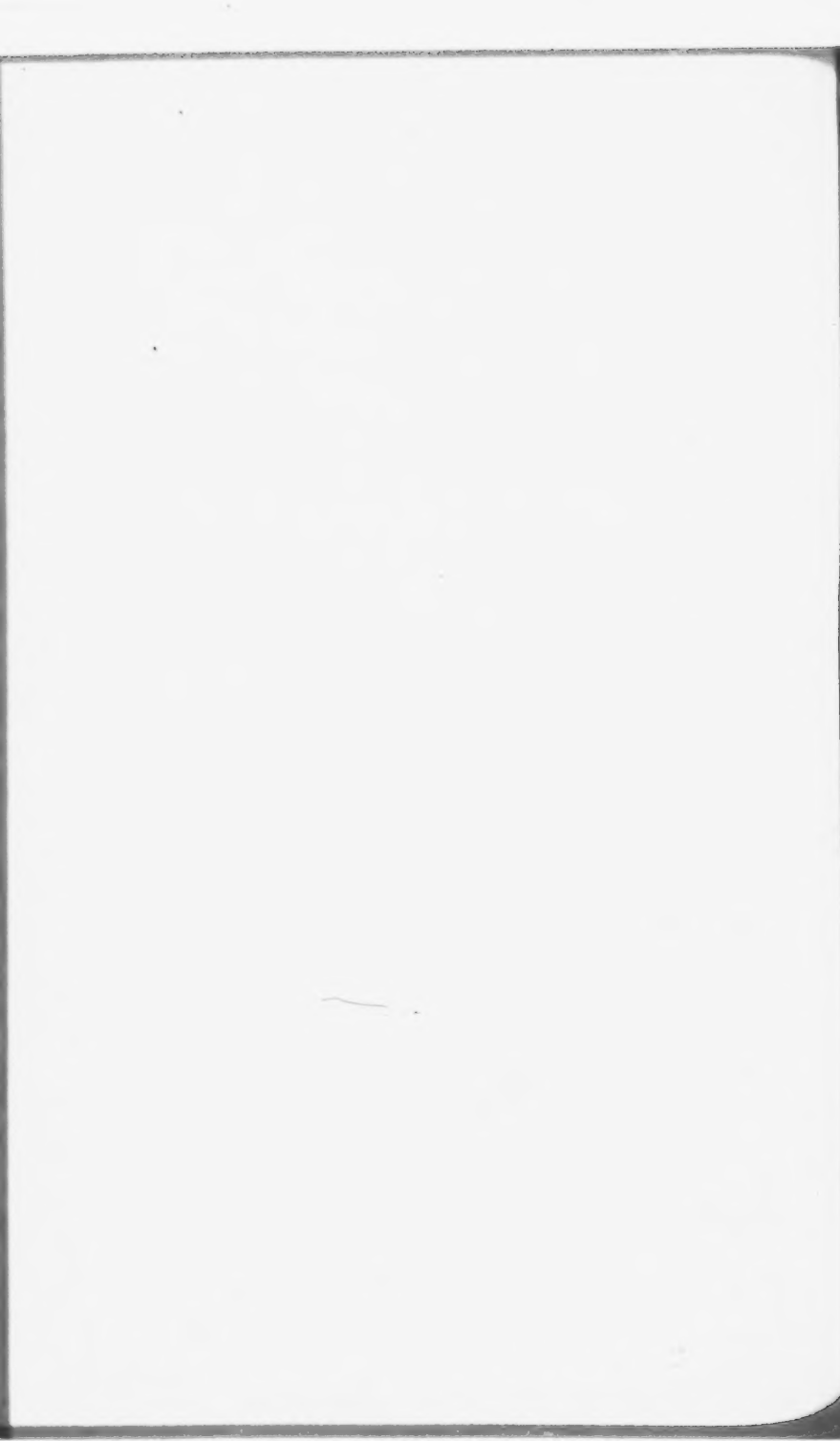
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(1)



# **In the Supreme Court of the United States**

OCTOBER TERM, 1946

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No. 640

BAILEY FARM DAIRY COMPANY, ET AL., PETITIONERS

v.

CLINTON P. ANDERSON, SECRETARY OF AGRICULTURE

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH  
CIRCUIT

---

## **BRIEF FOR RESPONDENT IN OPPOSITION**

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### **OPINIONS BELOW**

The opinion of the Circuit Court of Appeals (R. 376-391) is reported in 157 F. 2d 87. The opinion of the District Court (R. 29-69) is reported in 61 F. Supp. 209.

### **JURISDICTION**

The judgment of the Circuit Court of Appeals was entered on September 5, 1946 (R. 391-392). The petition for a writ of certiorari was filed on October 23, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347).

**STATUTE AND ORDER INVOLVED**

The statute involved is the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U. S. C. 601 *et seq.*), which reenacted, with amendments, the marketing provisions of the Agricultural Adjustment Act of 1933 (48 Stat. 31), as amended. The order involved is Federal Milk Order No. 3, regulating the handling of milk in the St. Louis, Missouri, marketing area, as amended and reissued by the Secretary of Agriculture on December 27, 1943, effective January 1, 1944 (8 F. R. 17451). The pertinent provisions of the Act and of the order are set forth in the appendix to the petition.

**QUESTIONS PRESENTED**

1. Whether Section 903.3 (e) of the order, which provides for the classification of producer milk, violates the statutory requirement in Section 8c (5) (A) of the Act that milk be classified in accordance with the form in which, or the purpose for which, it is used.

2. Whether Section 903.3 (e) of the order violates any other provision of the Act or deprives the petitioners of their property without due process of law.

**STATEMENT**

On January 1, 1944, the date when Federal Milk Order No. 3, as amended and reissued, became effective, the petitioners filed with the War Food Administrator, pursuant to Section 8c (15) (A).

of the Act, a petition requesting that the classification provision in Section 903.3 (e) of the order be set aside because it was not in accordance with law. A hearing on the petition was held on March 27 and 28, 1944; the presiding officer filed a report on June 8, 1944, recommending the dismissal of the petition; the petitioners filed exceptions to the presiding officer's report; and on August 11, 1944, the petitioners presented oral argument on the exceptions before the Assistant to the War Food Administrator. On September 27, 1944, the Assistant to the War Food Administrator stated his findings of fact and conclusions, denied the relief requested by the petitioners, and dismissed the petition. (R. 257-276.)

Petitioners, acting pursuant to Section 8c (15) (B) of the Act, filed their complaint in the district court on October 12, 1944, for review of the administrative ruling (R. 3-19). An answer was thereafter filed by respondents, in which it was averred that the administrative ruling was in accordance with law, and in which a counterclaim was made for the enforcement of the order (R. 20-25). A motion for summary judgment was filed by respondents on March 5, 1945 (R. 26-28). The district court, after hearing, filed an opinion sustaining the motion and entered judgment upholding the administrative ruling and requiring compliance with the provisions of the milk order (R. 29, 74-75). The Circuit Court

of Appeals for the Eighth Circuit affirmed (R. 375, 391-392).

Section 8c (1) and (2) of the Agricultural Marketing Agreement Act of 1937 authorizes the Secretary of Agriculture to issue marketing orders regulating the handling of specified commodities, including milk and milk products. The Act sets forth the purposes of milk orders, prescribes the manner in which they shall be issued, and outlines the terms they may contain. Section 8c (5) (A) and (B) (i) provides that milk orders may (1) provide for the classification of milk in accordance with the form in which, or the purpose for which, it is used, (2) establish a *minimum class price*, uniform as to all handlers, for each use classification of milk, and (3) require payment by each handler to producers of a *minimum producer-price*, uniform as to all producers delivering milk to the same handler (in the case of individual-handler type pools), computed upon the weighted average value of milk received by the handler at the minimum class-prices established therefor.

The principal regulatory provisions of Federal Milk Order No. 3, as amended, are those made pursuant to Section 8c (5) (A) and (B) (i) of the act. The order provides for the classification of all milk received by each handler according to its use (Section 903.3). Generally speaking, Class I includes milk used as fluid milk and Class

II includes milk used in some other form. The order fixes a *minimum class-price* for each class of milk (Section 903.4) and establishes a *minimum producer-price* to be paid by each handler to all his producers (Sections 903.7, 903.8). The class-prices are uniform for all handlers in the marketing area, and the producer-price is uniform for all producers delivering milk to the same handler. Mathematically, the uniform price to be paid by each handler to his producers is a blended price computed by multiplying the quantity of producers' milk in each use class by the minimum class-price applicable thereto, and by dividing the product by the total quantity of producers' milk received by the handler.

The minimum class-prices and the minimum producer-prices apply only to milk received from producers, as that term is defined in the order. Normally, producers are located in or near the local marketing area. However, some handlers in the St. Louis marketing area receive milk not only from producers but also from other persons who are not producers, principally from handlers in the Chicago area. The former milk is referred to as "producer milk" and the latter milk is referred to as "outside milk." Both the producer milk and the outside milk are in practice commingled by the handlers, and it is not possible to determine the specific uses made of each kind. Regardless of commingling, however, the order

provides for the classification in Class I or Class II of all milk received by a handler, i. e., both producer milk and outside milk, and then for the allocation of the milk in each class either to producer milk or to outside milk, or to both (Sec. 903.3 (e)). The issue in this case involves solely the validity of this allocation provision of the order.

With respect to a handler of both producer milk and outside milk, Section 903.3 (e) of the order provides, in effect, that the total quantity of milk classified according to use in Class I shall be allocated first to producer milk, and the balance, if any, to outside milk, subject to a 5% tolerance allowance. Specifically, where the total quantity of a handler's Class I milk is less than 95% of his total quantity of producer milk, all the Class I milk is regarded as producer milk. Where the total quantity of Class I milk is equal to or more than 95% of the total quantity of producer milk, a portion of the Class I milk that is not less than 95% of the producer milk is regarded as producer milk. In either event, the balance of the producer milk falls in Class II.

#### ARGUMENT

##### I

Section 8c (5) of the Act provides that milk orders shall classify milk "in accordance with the form in which or the purpose for which it is used." Petitioners contend that the allocation

provision of the St. Louis milk order provides for classifying milk according to its source and thus violates the statutory direction.

The order provides that all milk received by a handler shall be classified in Class I or Class II according to its use (Sec. 903.3). It follows that all of the handler's milk is classified according to use. But since only part of the milk classified—the producer milk as distinguished from the outside milk—is subject to the pricing provisions of the order, it is necessary to determine what portion of the total quantity of milk in each use classification will be regarded as producer milk. Some system of allocation is necessary. The question presented in this case, therefore, is not whether the milk is classified according to use, which it indisputably is, but whether the method for allocating the producer milk as between the two classes is reasonable.

The reasonableness of the basis of allocation adopted in the order is to be appraised in the light of the purposes of the Act. The Act declares (Sec. 8c (18)) that the minimum prices fixed in any milk order for payment by handlers to producers shall give milk a purchasing power equivalent to its purchasing power during the "base period", and under certain conditions the prices to be established shall be such as to insure an adequate supply of wholesome milk in the marketing area. We submit that the allocation pro-

vision of the St. Louis milk order, examined in the light of these objectives, is clearly reasonable.

A marketing area is largely dependent upon local producers for an adequate supply of fluid milk, and outside milk is normally marketed in fluid form only during periods when there is a shortage of locally produced milk. Consequently, if a handler of both producer milk and outside milk were allowed to apportion his sales of fluid milk in such manner as to place a substantial part of the milk received from local producers in Class II, with consequent lower payments to local producers, their purchasing power and the stability of the local milk supply for the area would be impaired. The allocation provision of the order, by assigning 95% of producer milk to Class I (provided such 95% does not exceed the total milk coming within this classification) is designed to prevent outside milk from displacing locally produced milk available for use in fluid form. The provision thus has the effect of stabilizing both the price and supply of locally produced milk.

Petitioners contend (Pet. 16-17) that the principle of proration is embedded in the Act and that proration is the only permissible method for allocating Class I milk between producer milk and outside milk. They suggest that the provisions of the Act for an individual handler pool, those for a market-wide handler pool, and those for

blending the proceeds of cooperative associations of producers, each applies the principle of proration. But these provisions deal with prorating the total value of milk or its proceeds and have nothing to do with proration of commingled milk. The producers, in the case of an individual handler pool, receive a uniform price from their handler which is based not upon the use value of the milk of any particular producer but upon the blended uses of the milk of all the handler's producers. In a market-wide pool, all the producers for the market receive a uniform price based not upon the use made of the milk of any producer by the individual handler to whom it is delivered but upon the blended uses of all handlers. In the case of a cooperative association of producers, the proceeds of its milk represents money received under varying conditions from different distributors, some of whom may be and others may not be subject to a federal milk order.

The St. Louis milk order, prior to the 1944 amendment, allocated producer milk to Class I by applying to the total amount of the handler's Class I milk the percentage which his receipts of producer milk bore to his receipts of both producer and outside milk. This is an obviously reasonable method of allocation. But, to use the words of the court below, "it cannot be said that it is the only permissible method, where the Secretary of Agriculture has concluded that it [the proration method] does not sufficiently solve

the effect on producers' prices of a fluid use of outside milk and where that conclusion cannot be held to be without a rational basis as a matter of administrative judgment" (R. 385).

It should also be noted that the proration method of allocation and the method of allocation adopted in the present order have the same relation to the so-called "source" of the milk. Under both methods all the milk received by the handler is first classified according to its use and then the amount of milk in each classification is apportioned between producer milk and outside milk. One method of allocation is no more a classification according to source than is the other.

Moreover, the principle involved in the allocation provision of the present order has been ratified by Congress. The Agricultural Marketing Agreement Act of 1937 reenacted with amendments the marketing provisions of the Agricultural Adjustment Act of 1933, as amended. There were outstanding at the time of this amendment several milk orders containing provisions indistinguishable in principle from the present formula, and Congress declared that all outstanding orders "are hereby expressly ratified."<sup>1</sup>

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<sup>1</sup> Agricultural Marketing Agreement Act of 1937, Sec. 4, 7 U. S. C. 672. In the orders ratified by Congress the "producer milk" consisted of milk acquired from producers other than the handler himself and the "outside milk" consisted of the handler's own production. All the handler's milk was classified according to use and the class utilization was then allocated to "producer milk" by excluding not exceeding 95%

## II

Petitioners contend (Pet. 20-21) that the allocation provision of the order violates the requirement of Section 8c (5) (A) of the Act that the minimum price for each use classification which handlers shall pay shall be uniform as to all handlers. This contention confuses minimum class-prices with minimum producer-prices. Minimum prices for Class I and for Class II milk are determined in accordance with the provisions of Section 903.4 of the order and are the same for all handlers. These class prices are not, however, the prices which handlers pay to producers. The class prices, which might more appropriately be termed use values, are applied to the total quantity of milk within each class received by the handler from his producers and the sum thus arrived at, after being divided by the total quantity of producer milk received by the handler, gives the uniform producer-price which the handler pays to his producers. The quantity of producer milk allocated to Class I or to Class II affects the prices which individual handlers pay to producers but has no bearing on the minimum class-prices, which remain the same regardless of the allocation. It should be remem-

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of the outside milk from Class I utilization (Fall River, Mass., Order No. 5, Art. VI, § 1, 1 F. R. 202) or from Class I and Class II utilization (Kansas City, Mo., Order No. 13, Art. VI, § 2, 1 F. R. 1724) and the balance from lower class utilization. See R. 386-387.

bered that under an order with an individual handler pool, although the class prices applied by each handler are the same, the uniform minimum prices payable by the several handlers to their producers necessarily vary.

The allocation provision of the order does not, as contended by petitioners (Pet. 22-23), direct handlers to use producer milk for Class I purposes before using outside milk for such purposes. Although under this provision 95% of producer milk is allocated to Class I (provided it does not exceed the quantity of milk actually used for Class I purposes), handlers are free to use all or any part of their outside milk as fluid milk.

There is also no basis for the petitioners' contention (Pet. 25-27) that the allocation provision of the order violates Section 8c (5) (G) of the Act, which provides:

No \* \* \* order applicable to milk  
\* \* \* in any marketing area shall prohibit \* \* \* the marketing in that area  
of any milk \* \* \* produced in any  
production area in the United States.

The St. Louis milk order does not prohibit or even regulate the acquisition, use or disposition of outside milk. The order does not regulate either the purchase price or the sales price of any outside milk which petitioners buy and then resell in the St. Louis marketing area. Under the order, petitioners are free to buy as much or as

little of such milk as they may wish. Petitioners' real complaint is that the prices which they are required to pay for producer milk allegedly make it unprofitable for them to purchase outside milk. That effect, if true, is purely collateral and is the result of economic factors, such as supply and demand, because the price of outside milk is determined solely by negotiation between the buyer and the seller. The Act contemplates (Sec. 8c (11) (A), (C)) that milk orders will be regional in application and that their terms will give due recognition to differences between areas in the production and marketing of milk. Minimum producer prices which are fixed by the Secretary in any regional order for the purpose of stabilizing the regional market and insuring an adequate supply of milk from local producers are not to be condemned merely because these prices make it less profitable, or unprofitable, for handlers subject to the order to purchase outside milk.

Petitioners further contend (Pet. 27-28) that the allocation provision of the order discriminates against them so grossly as to constitute a violation of due process requirements. Since the order treats all handlers exactly alike, the question raised is the alleged unfair and arbitrary nature of the order. As to this, we have already pointed out (*supra*, pp. 7-10) that the order is reasonably related to achieving a valid legislative purpose—stabilization of prices for producer milk and assurance of an adequate milk supply within the marketing area.

## III

Petitioners urge (Pet. 29-30) that this Court should review the decision below because of the likelihood that the same legal questions will be presented in litigation concerning certain other milk orders containing provisions like those which are contested in this case. We submit, however, that it is purely speculative whether or not there will be such litigation and the significant thing is that the questions upon which the court below ruled have not heretofore been presented to any circuit court of appeals and are not involved in any other pending litigation.

As to petitioners' assertion (Pet. 14) that the allocation provision of the order is designed to evade the policy of the Emergency Price Control Act of 1942, it should be noted that Section 3 (d) of that Act (50 U. S. C. App., Supp. V, 903 (d)) provides that nothing contained therein shall be construed to affect the provisions of the Agricultural Marketing Agreement Act of 1937 or to invalidate any present or future marketing order or any provision thereof issued under such Act.

## CONCLUSION

The questions presented were correctly decided by the court below and there is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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